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NO.
October Term 2008

Supreme Court, U.S.
FILED
071233 MAR 25 2008
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN BARRETT, M.D.
Petitioner

Versus

TEDD KOREN, D.C. and
KOREN PUBLICATIONS, INC.
Respondent

On Petition For Writ of Certiorari from the Order of the Pennsylvania Supreme Court

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED

WHETHER THE PRE-INTERNET CASE OF *New York Times v. Sullivan* ALLOWS A PUBLISHER OF A DEFAMATORY STATEMENT TO CONTINUE TO PUBLISH THE DEFAMATION ON ITS WEBSITE AFTER ACTUAL KNOWLEDGE OF THE FALSITY OF THE PUBLICATION WITHOUT ANY LIABILITY FOR DEFAMATION?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Stephen Barrett, MD respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania entered on January 2, 2008 to decide an important question of federal law which has not been, but should be settled by the Supreme Court.

OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania entered January 2, 2008 is reprinted at Page **1a** of the Appendix. The Order and Opinion of the Superior Court of Pennsylvania entered June 11, 2007, is reprinted at Page **2a** of the Appendix.

The Order and Opinion of the Court of Common Pleas of Lehigh County, Pennsylvania entered April 7, 2006, is reprinted at Page **31a** of the Appendix.

JURISDICTION

The final Order of the Supreme Court of Pennsylvania was entered January 2, 2008. This Petition For Writ of Certiorari is timely filed within ninety (90) days pursuant to Supreme Court Rule 13.1. The jurisdiction of this Honorable Court rests upon U.S.C. 1254(1) and Supreme Court Rule 10(c).

FEDERAL PROVISIONS INVOLVED

First Amendment to the United States Constitution U.S.C.A. Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

CONCISE STATEMENT OF THE CASE

A. Procedural History

On or about March 10, 2003, Plaintiff filed a Complaint against Defendants for defamation in the Court of Common Pleas of Lehigh County, Pennsylvania. On October 10, 2008, a jury trial commenced. At the close of Defendant's case, both parties moved for a directed verdict. On October 13, 2005, the trial court granted Defendants' motion and denied Plaintiff's motion. The Superior Court of Pennsylvania and the Supreme Court of Pennsylvania upheld the trial court's order granting a directed verdict in favor of Defendants.

When the trial judge decided to take Plaintiff's defamation case away from the jury, the judge stated that the United States Supreme Court, in *New York Times Company v. Sullivan,* 376 U.S. 254 (1964) held

that a defendant's failure to retract a defamatory statement complained of is not adequate evidence of actual malice for constitution purposes.

On appeal to the Superior Court of Pennsylvania, Plaintiff specifically argued that after Plaintiff informed Defendants that he was not "delicensed", Defendants were acting with actual malice when they kept false information on their website. The appellate court held that it agreed with the trial judge and found that Plaintiff failed to show actual malice based on Defendants' refusal to issue a retraction.

On Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, Plaintiff again specifically presented the issue concerning Defendants' failure to remove the defamatory statement from the internet. After receiving a request for retraction from the Plaintiff, Plaintiff argued that even after Defendants

were informed by Plaintiff that he had not been de-licensed, Defendants refused to remove it, correct it or otherwise retract it from their website. Hence, the federal question of the application of dicta from the 1964 case of *New York Times v. Sullivan,* to an internet case was timely and properly raised and preserved.

B. Material Facts

The Plaintiff is a retired psychiatrist who has devoted 35 years of his professional career to consumer protection issues to help people make intelligent decisions concerning health care. Plaintiff has been critical of some of the claims of the chiropractic profession and has been outspoken concerning his medical opinion of those claims. Due to the national recognition of Plaintiff's accomplishments, Plaintiff conceded at trial that he was a public figure, and must therefore prove that Defendants acted with

actual malice when they defamed him.

Defendants are a licensed chiropractor and his publishing company. Together, they maintain and operate a website providing information on chiropractic care. All current and past newsletters are archived on their website and are readily accessed through Defendants' website or through an internet search engine.

At the trial in this matter, Plaintiff introduced evidence that at age 60, he opted to inactivate his Pennsylvania medical license. He voluntarily retired, without any negative marks on his license or professional career. In Defendants' August 2001 newsletter, they referred to Plaintiff as the "de-licensed" physician, called him a "quackpot", and indicated that he was involved in a potentially meritorious ten million dollar racketeering lawsuit.

Plaintiff argued that all of these statements, when viewed in context, were defamatory, most especially the designation of him as "de-licensed".

In support of his position that the term "de-licensed" was calculated to devalue Plaintiff's professional status, as both a physician and consumer advocate, Plaintiff's counsel argued the term implied Plaintiff's medical license has been involuntarily revoked. Plaintiff presented the jury with the deposition of Defendant/Chiropractor Koren who testified that he had passed the chiropractic licensing tests in both Pennsylvania and West Virginia. The following exchange then took place:

> "Q. Are you still licensed in both states?
> A. I let my West Virginia license lapse.
> Q. When you say you let your license lapse in West Virginia, what do you mean?
> A. I didn't continue paying the fees. I didn't take the postgraduate education that they required.
> Q. Well, were you de-licensed by West Virginia?

A. No. No. Probably still there; I just stopped paying the fees."

Defendant Koren's defensive posture when asked if he was "delicensed" belies his true motive in so describing Dr. Barrett. The Defendant's clear design in writing an article, which even without the term "de-licensed" was highly critical and defamatory, was to undermine Plaintiff's professional reputation and credibility and to undermine his years of work as a consumer advocate. By creating the false impression that the medical profession disassociated itself with Plaintiff, defendants were hoping that the public would disregard Plaintiff's opinions concerning chiropractic medicine.

Even after Defendants were informed by Plaintiff that he had not been de-licensed, they refused to remove it, correct it, or otherwise retract it from their website. By virtue of its continued availability on the internet, the false and defamatory statement that

likely engender in the minds of the average reader, the statements are capable of defamatory meaning. *Tucker, supra.*. A statement is capable of defamatory meaning where it clearly imputes to the person to whom it refers, characteristics and conduct which are incompatible with the proper and lawful exercise of the person's profession. *Cosgrove Studio and Camera Shop, Inc. v. Pane,* 408 Pa. 314, 182 A.2d 751, 753 (1962). A statement is capable of defamatory meaning where the statement "could reasonably conclude that [the subject of the statement] lacked honor and integrity and was not a person to be relied upon insofar as his business dealings were concerned. *Birl, supra,* 167 A.2d at 476.

Considering the full text of the article, Defendants' statements were defamatory.

In the present case, the entire article about

the community or to deter third parties from associating or dealing with him." *Birl v. Philadelphia Elec. Co.*, 402 PA 297, 167 A.2d 475 (1960) (quoting RESTATEMENT (FIRST) OF TORTS §559 (1989), *Tucker v. Fischbein*, 237 F.3d 275 (3d Cir. 2001; 'The court must view the statements in context.' *Baker v. Lafayette College*, 516 Pa. 291, 532 A.2d 399, 402 (1987).

Words which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable. Thus, we must consider the full context of the article to determine the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.

Thomas Merton, 442 A.2d at 216; *'Orabl v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899, 904 (1971). While it is not enough that the victim of the statements be embarrassed or annoyed, a court should not dismiss a case unless it is 'clear' that the publication is incapable of defamatory meaning. *Tucker v. Fischbein*, *supra*; *Vittreck v. Washington Board Co.*, 256 Pa Super 427, 389 Pa. Super 427 (1978"

Reading the statements at issue in this case, in context and looking at the impression that they would

integrity as a member of his profession, the statement is actionable as defamation. *Post v. Mendel,* 507 A.2d 35, 352 Pa (1986) (disparaging a lawyer-plaintiff's integrity as a legal professional is actionable defamation. See also, *Tucker v. Philadelphia Daily News,* 577 Pa. 598, 615, 848 A.2d 113, 124 (2004). (newspaper article was defamatory because it incorrectly implied that community activists were overly interested in money and sex, which would lessen their reputation in the community and likelihood that members of the community would want to associate with them); *MacElree v. Philadelphia Newspapers, Inc.,* 544 Pa. 117, 674 A.2d 1050, 1054 (1996) (publication that implied plaintiff in defamation suit was abusing his elected office and was racist was defamatory because it accused plaintiff of professional misconduct). It is not clear that calling a doctor delicensed is incapable of

defamatory meaning. *Tucker v. Fischbein, supra.* Hence, a jury should determine if the statement was defamatory.

2. A jury should determine if Defendants' continuing publication of the defamatory statements on their website after knowledge of their falsity constitutes reckless disregard or actual malice.

A. The First Amendment demands that Plaintiff, a public figure, prove that the alleged defamatory statement was false and that it was made with actual malice. *Hustler Magazine v. Falwell,* 485 U.S. 46, 52, 99 L.Ed.2d 41, 108 S.Ct. 876 (1988); *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 11 L.Ed.2d 686, 84 S.Ct. 710 (1964); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 162-165, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967).

Under *New York Times v. Sullivan,* and its progeny, actual malice means knowledge that the

statement was false or made with reckless disregard of whether it was false or not. *New York Times,* 376 U.S. at 279-80. Plaintiff must meet the clear and convincing evidentiary standard concerning whether the evidence presented is such that a reasonable jury might find that actual malice has been shown with convincing clarity. *Anderson v. Liberty Lobby,* 477 U.S. 242, 257, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986).

B. The mere refusal to retract, by itself, is not sufficient evidence to prove actual malice. *New York Times Co. v. Sullivan* involved an Alabama law which denies a public official recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless plaintiff first made a written demand for a public retraction and defendant fails or refuses to comply. Ala. Code Title 7 §914. Defendant failed to retract the allegedly defamatory statement concerning public figure Plaintiff. The lower

courts ruled malice could be inferred from Defendants' irresponsibility in publishing the statement and from Defendants' failure to retract. Under Alabama law, good motives and belief in truth did not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co. v. Davis,* 271 Ala 474, 124 SO.2D 441 (1960).

This Honorable Court held that the rule of law applied by the Alabama courts was constitutionally deficient for failure to provide defendant the safeguards for freedom of speech and of the press that are guaranteed by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. This Court held that defendant's constitutional guarantees required a rule that prohibited a public official from recovering damages for a defamatory falsehood relating to the public official's

official conduct unless the official proved that the statement was made with actual malice. This Court defined actual malice as knowledge that the defamatory statement was false or made with reckless disregard of whether it was false or not.

C. Republication of a defamatory statement after notice of its falsity may be treated as evidence of actual malice. Under the evolving body of law since *New York Times v. Sullivan,* publication of a statement after defendant has been notified that plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard.

In 1977, the American Law Institute adopted 580A Restatement 2d of Torts which states that:

> "One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct fitness or ole in that capacity is subject to liability if, but only if, he (a) knows that the statement is false and that it defames the other person; or (b) acts in reckless disregard of these matters."

Comment (d) states, *inter alia* that:

> "Republication of a statement after the defendant has been notified that the plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard. There has been no judicial treatment of the effect of the defendant's refusal to retract a statement after it has been demonstrated to him to be both false and defamatory. Under certain circumstances, evidence to this effect might be relevant in showing recklessness at the time the statement was published. It is also possible that the Supreme Court would hold that a state can constitutionally treat a deliberate refusal to retract a clearly false defamatory statement as meeting the knowledge-or reckless disregard standard even though the conduct occurred subsequent to the publication."

Weaver v. Lancaster Newspapers, Inc., 592 Pa. 458, A.2d 899 (2007); *Barnett v. Nat'l Enquirer, Inc.*, 144 Cal. App.3d 991, 193 Cal. Rptr 206 (1983); appeal dismissed 465 U.S. 1014 (1984); *Golden Bear Distrib. Sys. v. Chase Revel Inc.*, 708 F.2d 944 (5th Cir. 1983) where the record demonstrates that defendant had

sufficient time to investigate the truth of the defamatory statement, a jury could find that defendant acted with reckless disregard of the truth constituting actual malice). The issue of whether defendants acted with malice or reckless disregard of the falsity of the defamatory statements remains a material issue to be resolved by the trier of fact. *Stucchio v. Tincher,* 726 S.2d 372 (1999) Fla. App. LEXIS 1120.

D. Plaintiff established actual malice because Defendants kept the information on the website after Plaintiff requested a retraction. Once Plaintiff informed Defendants that he had not been delicensed, Defendants acted with actual malice in failing to remove the defamatory assertion from their website.

Plaintiff informed Defendants that Plaintiff had not been delicensed. Defendants failed to remove this information from their website or otherwise indicate therein that the information was incorrect. The

continued appearance of the information on the website was not the equivalent of failing to print a retraction. A newspaper is printed once and then archived. On the other hand, when information is placed on a website and not removed, it remains readily available and reviewed, and hence, continues to be published. Defendants published the information with actual knowledge that it was false.

The Internet can be a dangerous tool, and when someone is informed that information detrimental to a person's professional standing is factually wrong, the person who chooses to maintain that information on their website should not be permitted to do so with impunity. When this comment is viewed in a light most favorable to Plaintiff, a jury could reasonably have concluded that the Defendant was liable. Hence, this defamation action should not have been removed from

consideration by the jury.

E. A jury should determine whether Defendants' continuing publication of the defamatory statement on the Internet after notice of the statement's falsity constitutes reckless disregard or actual malice. Clearly, *New York Times* stated that failure to retract upon Plaintiff's demand is not adequate evidence of actual malice for constitutional purposes. 376 U.S. at 286. The mere refusal to retract by itself, is not sufficient evidence to prove actual malice. Under certain circumstances, evidence of a refusal by a publisher to retract a statement after it has been demonstrated to him to be false and defamatory might be relevant in showing recklessness at the time the statement was published. *Golden Bear, supra.*

It is likewise that refusal to retract may be evidence that there was no actual malice: the refusal may show that the publisher believed and still believes

that the falsehood was true. That a particular piece of evidence may point both ways does not mean that it is not evidence. The reasonableness of the refusal might be some indication of which inference was more likely. When a given fact is susceptible to two reasonable inferences, it is for the jury to determine which one it will adopt. *Time, Inc. v. Hill,* 385 U.S. 374, 394 N. 11, 17 L.Ed.2d, 87 S.Ct. 534 (1967). Dr. Barrett was denied the opportunity for the jury to decide.

Whether the failure of Defendants to investigate constitutes sufficient proof of "reckless disregard" in publication of the truth depends upon the state of the record. *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967). Ill will does present circumstantial evidence of actual malice which may be considered by the jury. *Indianapolis Newspapers, Inc. v. Fields,* 354 Ind. 219, 250, 259 N.E.2d 651, 664 (1970; *Nevada Indep. Broadcasting*

Corp. v. Allen, 99 Nev. 404, 664 P.2d 337 (1983). However, this is not a case of mere ill will or bad motive toward Plaintiff, Defendants' actions demonstrate an actionable intent to harm through falsehood. See, *Henry v. Collins,* 380 U.S. 356, 357, 13 L.Ed.2d 892, 85 S.Ct. 992 (1965). Koren's failure to retract here was not a simple matter of ill will or bad motive toward Plaintiff. A reasonable jury could hold Defendants liable for their attitude toward the veracity of their statements after positively learning that Dr. Barrett was not delicensed. Hence, Plaintiff respectfully petitions for a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Petition For Writ of Certiorari ought to be granted.

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